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Jury Instructions on Joint and Several Liability in Washington State

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JURY INSTRUCTIONS ON JOINT AND SEVERAL LIABILITY IN WASHINGTON STATE

Abstract: Neither the Washington Legislature nor the Washington Supreme Court has addressed the issue of instructing a jury on Washington's doctrine of modified joint and several liability and its effects. Historically, most states prevented courts from instructing juries on the effects of their answers to special verdicts. Washington, however, has no history of keeping a jury uninformed of the effects of its answers. This Comment concludes that Washington courts should continue the practice of informing juries of the effects of their answers and instruct juries on joint and several liability and its effects.

Two cars collide on an isolated stretch of highway in Washington State. Ann Nickel is severely injured in the accident. Bob English's car crossed the center line while rounding a sharp curve and collided with Ann's car as she rounded the curve traveling the opposite direction. Ann brings suit in a Washington State court, alleging that both Bob's negligent driving and the State's negligent design of the highway were proximate causes of her injuries.

Under Washington's modified doctrine of joint and several liability, joint liability between defendants exists only if the plaintiff is free from fault. The existence of joint liability allows a plaintiff to recover the whole judgment from a single defendant. The determination of joint liability thus has great significance to both the plaintiff and the defendants. In Washington, however, the law on informing the jury of joint and several liability and its consequences is unclear. Neither the Washington courts nor the Legislature has addressed the issue of whether courts may inform juries about joint and several liability.

If courts may not instruct juries on joint and several liability, the jury's assignment of a small percentage of fault either to the State or to Ann may have unintended consequences. Two examples of jury outcomes highlight these consequences. One possible result of Ann's suit against Bob and the State is the assignment of no fault to Ann, one percent of fault to the State and ninety-nine percent of the fault to Bob. If Bob is insolvent, the State, through its joint liability, must pay the entire damage award. Another possible outcome of Ann's suit is the jury assigning one percentage point of fault to both Ann and the State, and assigning the remaining ninety-eight percent to Bob. Even if Bob is insolvent, the State is liable only for the percentage of the harm attributed to its negligence, and Ann may recover only one percent of her damages. Because of these possible consequences, both the State and Ann may wish an instruction on joint and several liability.

After discussing Washington's tort system and the instruction of Washington juries in tort actions, this Comment examines how other

states have addressed informing juries of the effects of their answers in tort actions. Historically, most state courts did not allow instruction of juries on the effects of their answers to special verdicts.[1] Many states altered this rule, however, and allow courts to inform juries of the effects of modified comparative negligence.[2] Several states have applied the reasoning of these modified comparative negligence decisions to the doctrine of joint and several liability. Most of these decisions have allowed courts to inform juries of the doctrine.

This Comment concludes that Washington should also allow courts to inform juries of the doctrine of joint and several liability and its effects. The problems created by the Washington courts' failure to inform juries of Washington joint and several liability law are analogous to the problems found by courts in modified comparative negligence states. As in these states, the solution to these problems is to permit courts to inform juries of the effects of their answers. In addition, allowing courts to inform juries is consistent with past Washington practice. Finally, an informed jury's determination of the liabilities of the parties better assures accomplishment of the objectives of Washington tort reform.

I. WASHINGTON TORT LAW

Washington tort law is, in some respects, unusual. The distinctive features include the state's pure comparative fault system[3] and its modification of the common law doctrine of joint and several liability.[4] Although Washington tort law differs in some ways from tort law in other states, the general principles followed in Washington are the same.

A. The Law of Comparative Negligence in Washington

Under the common law, the doctrine of contributory negligence requires a verdict for the defendant when the jury finds the plaintiff's conduct contributed to the plaintiff's injuries.[5] This doctrine places the entire burden for an injury on the plaintiff when both the defend-

1. *See infra* notes 47–51 and accompanying text; *see also infra* notes 41–46 and accompanying text (explaining the use of special verdicts).

2. *See infra* notes 52–68 and accompanying text.

3. In 1981, the Washington Legislature enacted comparative fault. Comparative fault is broader than comparative negligence and includes actions involving products liability and strict tort liability. *See* Act of April 17, 1981, ch. 27, § 9, 1981 Wash. Laws 112, 117 (codified at WASH. REV. CODE ANN. § 4.22.015 (West 1989)). The differences between comparative negligence and comparative fault are beyond the scope of this Comment.

4. *See infra* notes 13–22 and accompanying text.

5. *See* WILLIAM L. PROSSER, THE LAW OF TORTS 416–18 (4th ed. 1971).

ant and the plaintiff are responsible.[6] The harsh consequences of the doctrine led states to alter the common law and adopt comparative negligence.[7]

State legislatures adopting comparative negligence have a choice between adopting modified or pure comparative negligence. Modified comparative negligence allows the plaintiff to recover only when the plaintiff's own negligence is less than a specific percentage of the negligence of all parties.[8] One variation of modified comparative negligence requires that the plaintiff be less negligent than the defendant.[9] Under this formulation, the plaintiff's negligence must be forty-nine percent or less in order to recover damages. The second variation of modified comparative negligence requires that the plaintiff's negligence not be greater than the defendant's. This allows a plaintiff who the jury finds to be fifty percent or less at fault to recover damages.[10]

Washington adopted the pure form of comparative negligence in 1973.[11] Pure comparative negligence allows the plaintiff to recover the percentage of harm attributed to the defendant's negligence, regardless of the percentage of fault attributed to the plaintiff.[12]

B. The Doctrine of Joint and Several Liability in Washington

Under common law joint and several liability, multiple tortfeasors who cause an indivisible injury are each liable for the entire harm.[13] Because each defendant is liable for the total damage award, the plaintiff may demand payment from a single defendant. After paying the damages, the chosen defendant is then left to seek contribution from the other defendants.[14] The ability to recover the whole award from a single defendant is particularly important where one defendant is

6. *Id.* at 433.

7. *Id.; see also* Act of April 17, 1981, ch. 27, § 1, 1981 Wash. Laws 112, 112 (modification of tort law to ameliorate harsh common law doctrines); David C. Sobelsohn, *"Pure" vs. "Modified" Comparative Fault: Notes on the Debate,* 34 EMORY L.J. 65, 65–66 (1985).

8. Sobelsohn, *supra* note 7, at 67.

9. *Id.* at 67–68.

10. *Id.; see also infra* notes 52–68 and accompanying text (discussing the instruction of juries on modified comparative negligence).

11. WASH. REV. CODE ANN. § 4.22.05 (West 1989); *see also* Sobelsohn, *supra* note 7, at 68; Thomas R. Trenkner, Annotation, *Modern Development of Comparative Negligence Doctrine Having Applicability to Negligence Actions Generally,* 78 A.L.R.3D 339 (1977). Pure comparative negligence is the minority approach. As of 1990, of the 45 states adopting comparative negligence, only 14 states and Puerto Rico had adopted the pure form. ARTHUR BEST ET AL., COMPARATIVE NEGLIGENCE § 2.30 (Barry D. Denkensohn et al. eds., Supp. 1990).

12. *See* Sobelsohn, *supra* note 7, at 68.

13. *See* PROSSER, *supra* note 5, at 297.

14. *See id.* at 307.

insolvent or lacks the resources to pay his or her percentage of the award.[15]

The Washington Legislature altered the common law doctrine of joint and several liability in the Tort Reform Act of 1986.[16] In general, joint liability between multiple defendants exists under the Tort Reform Act only when the plaintiff is entirely free from fault.[17]

The Legislature passed the Tort Reform Act to reduce the cost of insurance.[18] The Legislature found that the then-existing tort system escalated the costs of insurance. The increased insurance costs discouraged private businesses and organizations from engaging in socially and economically desirable activities, and caused governmental entities to reduce services.[19] The application of joint and several liability allows collection of the entire damage award from businesses and government entities that may be only a small percentage at fault. For example, accidents on state highways, such as the accident between Ann and Bob described earlier, may involve a one or two percent allocation of fault to the State. Each time the state is found a small percentage at fault, however, it may have to pay the entire damage award.

The Legislature was persuaded that by placing liability on defendants only marginally responsible for the plaintiff's harm, the then existing tort system created losses so large that the insurers of government and business were forced to raise their rates.[20] To lower rates, the Legislature eliminated the application of joint and several liability

15. *See* Larry Pressler & Kevin V. Schieffer, *Joint and Several Liability: A Case for Reform*, 64 DENV. U. L. REV. 651, 652 (1988).

16. WASH. REV. CODE ANN. § 4.22.070(1)(b) (West 1989). In the Tort Reform Act of 1986, the Washington Legislature gave the word "several" a meaning different from the word's meaning under common law joint and several liability. At the common law, a party's several liability was for the total amount of the plaintiff's damages. In the first paragraph of section 4.22.070(1), "several" means that party's share of the total damages as determined by the proportion of that party's fault to the total fault of all parties and entities. In section 1(b), however, "several" means the sum of the amounts for which all of the defendants are liable. This second meaning is different from the meaning used in the first paragraph and the common law meaning.

17. *Id.* § 4.22.070. The Act, however, excepts cases involving certain types of activity. Joint liability exists under section 1(a) for persons acting in concert and for employers and employees. *Id.* Joint liability is also preserved for specific categories of cases listed under section 3. *Id.*

18. Act of April 4, 1986, ch. 305, § 100, 1986 Wash. Laws 1354, 1354. "The purpose of this chapter is to enact further reforms in order to . . . increase the availability and affordability of insurance." *Id.*

19. *Id.; see generally,* Pressler & Schieffer, *supra* note 15, at 654–60 (many states have altered joint and several liability as a method of reducing the tort liability burdening deep pockets).

20. *See* Act of April 4, 1986, ch. 305, § 100, 1986 Wash. Laws 1354, 1354; Cornelius J. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233, 238 (1987).

when the plaintiff was partially responsible for the harm. The Legislature hoped to decrease the losses of insurance companies, enabling them to charge lower premiums.[21] Evidently, the Legislature believed lower premiums would allow government to use the savings to provide services and businesses to continue operation.[22]

As a result of the Tort Reform Act, defendants facing joint liability now have great incentive to persuade the jury that the plaintiff is somewhat at fault. When the jury finds the plaintiff at fault, even if the fault is marginal, each defendant is liable only for the proportion of the damage award corresponding to the share of the total fault assigned to that defendant. A plaintiff who may be unable to recover from the main defendant will want the jury to know the incentive behind the other defendants' argument that the plaintiff bears some fault.

C. Instructing a Jury in Washington

Washington courts have not yet addressed the issue of informing the jury when special verdicts are used. Washington court practice, however, allows trial courts discretion in their submission of special verdicts and in their instructions to the jury. Trial courts have used their discretion in choosing types of verdicts and in providing instructions informing juries of the effects of their answers in some situations.

1. Forms of Verdicts in Washington

Washington courts have the discretion to choose the type of verdict submitted to the jury.[23] Under Washington Court Rule 49, the court may submit general verdicts, general verdicts with interrogatories, or special verdicts.[24] While courts generally submit a general verdict in most cases, the Washington comparative fault statute requires the jury to make specific findings of fault in negligence cases.[25] To accomplish this, courts generally submit special verdict forms to the jury that require specific answers regarding each party's fault.[26]

21. *See* Peck, *supra* note 20, at 238.

22. *See* Act of April 4, 1986, ch. 305, § 100, 1986 Wash. Laws 1354, 1354.

23. WASH. CT. R. 49.

24. *Id.*

25. WASH. REV. CODE ANN. § 4.22.070(1) (West 1989). In a negligence action, the jury must determine the percentage of the total fault attributable to every entity causing the claimant's damages. *Id.* The entity requirement allows the jury to assign fault to non-parties. *Id.*

26. *See, e.g.*, Garcia v. Brulotte, 94 Wash. 2d 794, 620 P.2d 99 (1980); *see generally* BEST et al., *supra* note 11, § 3.40 (explaining the general method of submitting damage questions to the jury). The *Washington Pattern Jury Instructions* reflect this general practice. The special verdict

2. *Washington Courts Have Discretion in the Instructions Provided to the Jury*

Washington courts must present instructions that allow each party to argue their theory of a case.[27] The form of the instruction, however, is discretionary.[28] Courts may confine their instructions to specific aspects of law or may give abstract instructions.[29] Courts are not allowed to give an abstract instruction, however, if the instruction might mislead or confuse the jury.[30]

Washington courts have used this discretion to give abstract instructions in negligence cases. Two examples of this discretion are courts' instructions to juries on the doctrines of contributory negligence and assumption of risk. In the past, the existence of either doctrine completely barred recovery by the plaintiff.[31] The Washington Supreme Court has repeatedly upheld instructions on contributory negligence as proper.[32] Similarly, Washington courts have consistently instructed juries on the doctrine of assumption of risk and its effects.[33]

3. *Washington Has Not Addressed Whether Juries Should Be Informed of Joint and Several Liability*

Neither the Washington Legislature nor the courts have addressed the issue of informing a jury of the effects of special verdicts. In *Sofie v. Fibreboard Corp.*,[34] however, the Washington Supreme Court noted

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forms developed for the Tort Reform Act ask the jury to determine which entities are negligent and to assign a percentage of fault to each negligent entity. WASHINGTON SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, 6 WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS, CIVIL 45.20–45.27 (3d ed. 1988) [hereinafter WASHINGTON PATTERN JURY INSTRUCTIONS].

27. Farm Crop Energy, Inc. v. Old Nat'l Bank, 109 Wash. 2d 923, 932, 750 P.2d 231, 237 (1988).

28. *See id.* at 932, 750 P.2d at 237.

29. *See* Bennington v. Northern Pac. Ry., 113 Wash. 1, 6, 192 P. 1073, 1075 (1920). An abstract instruction is a general statement of a legal principle. *Id.* Abstract instructions are discretionary. *See* State v. O'Connell, 83 Wash. 2d 797, 810, 523 P.2d 872, 882 (1974), *overruled by* Scott Fetzer Co. v. Weeks, 114 Wash. 2d 109, 786 P.2d 265 (1990); *see also* Lloyd L. Wiehl, *Instructing a Jury In Washington,* 36 WASH. L. REV. 378, 383–85 (1961) (abstract instructions are generally sufficient).

30. Herndon v. Seattle, 11 Wash. 2d 88, 104, 118 P.2d 421, 429 (1941).

31. Prior to 1987, assumption of risk was a complete bar to recovery. *See, e.g.,* Lyons v. Redding Constr. Co., 83 Wash. 2d 86, 95, 515 P.2d 821, 826 (1973). In 1987, implied assumption of risk was held to be a damage reducing factor in negligence actions. Kirk v. Washington State Univ., 109 Wash. 2d 448, 457–58, 746 P.2d 285, 289–91 (1987).

32. *See* Owens v. Kuro, 56 Wash. 2d 564, 354 P.2d 696 (1960); Case v. Peterson, 17 Wash. 2d 523, 527, 136 P.2d 192, 194 (1943).

33. *See Kirk,* 109 Wash. 2d at 458, 746 P.2d at 291; Martin v. Kidwiler, 71 Wash. 2d 47, 50, 426 P.2d 489, 491 (1967).

34. 112 Wash. 2d 636, 771 P.2d 711, *opinion amended,* 780 P.2d 260 (1989).

that the trial judge instructed the jury to apply common law joint and several liability to the defendants.[35] The court in *Sofie* did not discuss whether this instruction or an instruction on Washington's modified joint and several liability is permissible. The court, however, indicated that the Legislature may prescribe the factors that a jury may consider in determining liability.[36]

Unlike other states,[37] Washington has no history of keeping a jury uninformed. To the contrary, Washington courts historically have informed juries of the consequences of their answers. Washington courts never addressed the problems created in modified comparative negligence cases when a jury is not informed of the effects of its answers because Washington adopted the pure form of comparative negligence. As a result, Washington has no case law to draw upon in this area.

II. TREATMENT OF INSTRUCTING THE JURY ON THE EFFECTS OF ITS ANSWERS TO SPECIAL VERDICTS IN OTHER STATES

Beginning in the nineteenth century, courts and legislatures developed a rule barring courts from informing juries of the effects of their special verdict findings.[38] Washington never adopted this rule. Many states that adopted the rule against informing juries discarded it after they adopted comparative negligence.[39] Judicial decisions eliminating the rule in comparative negligence cases formed the foundation for decisions by several state courts eliminating the rule in joint and several liability cases.[40]

35. *Id.* at 667, 771 P.2d at 727. The *Sofie* case required the application of common law joint and several liability because the case involved an exception under section 4.22.070(3). In *Sofie,* the Washington Supreme Court held unconstitutional a provision in the Tort Reform Act of 1986 that placed a cap on the recovery of economic damages and required that courts not inform juries of this cap. *Id.* at 650–51, 771 P.2d at 719. The court did not directly address the requirement that courts not instruct the jury on the damage cap.

36. *Id.* at 666, 771 P.2d at 727.

37. *See infra* notes 47–51 and accompanying text.

38. Throughout the remainder of this Comment, the prohibition against informing the jury of the effects of its answers to special verdicts will be referred to as the rule against informing juries.

39. *See infra* notes 52–59 and accompanying text.

40. *See infra* notes 69–85 and accompanying text.

A. The Rule Against Informing Juries of the Effects of Their Answers to Special Verdicts

1. The Use of Special Verdicts

Special verdicts require that the jury answer specific factual questions and leave the determination of the outcome of the case to the court that applies the law to the jury's findings of fact.[41] Special verdicts help the jury reach their findings of fact by providing a logical framework for their deliberations, and aid appellate courts by creating a record of the jury's findings on each issue.[42]

The special verdict is fundamental to comparative negligence.[43] With a special verdict, the jury assigns a percentage of fault to each of the parties and determines the total damages.[44] Interrogatories[45] and special verdicts assure the court that the jury has determined the fault of each party, and help the court make the final allocation of damages between the parties.[46] Once the jury answers the questions in the special verdict, the court applies the law to the jury's answers, reducing any damage award by the percentage of fault attributed to the plaintiff.

2. Historical Treatment of Informing Juries of the Effects of Their Answers to Special Verdicts

Historically, most states barred their courts from informing juries of the effects of their special verdicts.[47] The rule against informing the jury developed before the turn of the century in the courts of Wisconsin.[48] Other states also adopted the rule against informing[49] and by

41. BLACK'S LAW DICTIONARY 1560 (6th ed. 1990).

42. *See* Stuart F. Schaffer, Comment, *Informing the Jury of the Legal Effect of Special Verdict Answers in Comparative Negligence Actions,* 1981 DUKE L.J. 824, 827–28.

43. *Id.* at 829.

44. *See* Sobelsohn, *supra* note 7, at 66–68; Note, *Informing the Jury of the Effect of Its Answers to Special Verdict Questions—The Minnesota Experience,* 58 MINN. L. REV. 903, 903–04 (1974); *see also* WASHINGTON PATTERN JURY INSTRUCTIONS, *supra* note 26, 45.20–45.27.

45. When a court submits a general verdict it may also require the jury to answer questions set forth in interrogatories. *See* WASH. CT. R. 49(b).

46. *Id.*

47. *See* Schaffer, *supra* note 42, at 832.

48. Ryan v. Rockford Ins. Co., 46 N.W. 885, 886 (Wis. 1890); *see generally* D.A. Cox, Annotation, *Reversible Effect of Informing Jury of the Effect that Their Answers to Special Interrogatories or Special Issues May Have Upon Ultimate Liability or Judgment,* 90 A.L.R.2D 1040 (1963).

49. *See* McCourtie v. United States Steel Co., 93 N.W.2d 552, 562–63 (Minn. 1958); Harbison v. Briggs Bros. Paint Mfg. Co., 354 S.W.2d 464, 471 (Tenn. 1962), *overruled by* Ennix v. Clay, 703 S.W.2d 137 (Tenn. 1986); McFaddin v. Herbert, 15 S.W.2d 213, 217–18 (Tex. 1929); McGinn v. Utah Power & Light Co., 529 P.2d 423, 424 (Utah 1974), *overruled by* Dixon v. Stewart 658 P.2d 591 (Utah 1982).

the 1970s, the rule against informing had become the majority rule.[50] Courts and commentators in favor of a rule against informing believe that informing a jury defeats the impartiality created by special verdicts because it allows the jury to manipulate their answers to produce a desired result.[51]

B. The Growth of Comparative Negligence and the Decline of the Rule Against Informing Juries

As states adopted comparative negligence, courts and lawmakers began re-evaluating the rule against informing juries.[52] Under modified comparative negligence systems, plaintiffs may not recover when their proportion of negligence reaches a specified percentage.[53] An uninformed jury will not know this rule and therefore has no knowledge of the significance of their assignment of fault. Many states adopting modified comparative negligence eliminated the rule against informing juries because modified comparative negligence's cut-off point can frustrate the jury's decision to allow partial recovery.[54] Some states eliminated the rule by statute.[55] Others eliminated the rule judicially.[56]

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50. Schaffer, *supra* note 42, at 832–33; Michael J. Norton, Comment, McGinn v. Utah Power & Light Co.-*Jury Blindfolding in Comparative Negligence Cases,* 1975 Utah L. Rev. 569, 572.

51. *See* Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 57 (2d Cir.), *cert. denied,* 335 U.S. 816 (1948); *McCourtie,* 93 N.W.2d at 563; *Ryan,* 46 N.W. at 886; *see also* Note, *supra* note 44, at 906–08.

52. Schaffer, *supra* note 42, at 836–37.

53. *See supra* notes 8–10 and accompanying text.

54. *See* Elliot Talenfeld, *Instructing the Jury as to the Effect of Joint and Several Liability: Time for the Court to Address the Issue on the Merits,* 20 ARIZ. ST. L.J. 925, 933 (1988).

55. Two states mandate a general verdict, thus requiring courts to inform the jury of the law and its application. *See* N.H. REV. STAT. ANN. § 507:7d (Supp. 1991); VT. STAT. ANN. tit. 12, § 1036 (1973). Statutes or court rules in five states require that juries be informed of the effect of their answers to special verdicts or interrogatories assigning fault. COLO. REV. STAT. § 13-21-111.5(5) (1989); HAW. REV. STAT. § 663-31(d) (1985); MINN. R. CIV. P. 49.01(2) (Supp. 1991); OR. REV. STAT. § 18.480(2) (1991); WYO. STAT. § 1-1-109 (1991). Finally, one state allows the court to inform the jury of the effect of its assignment of fault upon request of a party. N.D. CENT. CODE § 9-10-07 (1987).

56. *See* Seppi v. Betty, 579 P.2d 683, 692 (Idaho 1978); Reese v. Werts Corp., 379 N.W.2d 1, 3 (Iowa 1985); Thomas v. Board of Township Trustees, 582 P.2d 271, 280 (Kan. 1978); Wing v. Morse, 300 A.2d 491, 501 (Me. 1973); Thurston v. Ballou, 505 N.E.2d 888, 891 (Mass. App. Ct. 1987); Martel v. Montana Power Co., 752 P.2d 140, 146 (Mont. 1988); Roman v. Mitchell, 413 A.2d 322, 327 (N.J. 1980); Schabe v. Hampton Bays Union Free Sch. Dist., 480 N.Y.S.2d 328, 336 (1984); Smith v. Gizzi, 564 P.2d 1009, 1013 (Okla. 1977); Peair v. Home Ass'n of Enola Legion No. 751, 430 A.2d 665, 671–72 (Pa. Super. 1981); Dixon v. Stewart, 658 P.2d 591, 596–97 (Utah 1982); Adkins v. Whitten, 297 S.E.2d 881, 884 (W. Va. 1982).

The Idaho Supreme Court was the first to discuss the problem of informing the jury under modified comparative negligence.[57] In *Seppi v. Betty,*[58] the Idaho court held that instructions on the effects of comparative negligence are warranted where they would not mislead or confuse the jury or create undue complexity.[59] Most of the states rejecting the rule against informing adopted the *Seppi* court's reasoning.

The *Seppi* court believed that the rule against informing produces erroneous results by creating traps for the uninformed jury.[60] A fifty-fifty allocation of fault is naturally attractive in negligence cases where the jury members cannot agree or where it is clear that both parties were negligent.[61] The natural attractiveness of a fifty-fifty finding may create a trap by placing the defense counsel in a position to exploit the attractiveness of a fifty-fifty finding. The defense may encourage the jury to split the allocation of fault and neither the court nor plaintiff's counsel may advise the jury of the consequences.[62] The *Seppi* court argued that this possible deception is a trap that allows the uninformed jury to believe it is fairly compensating the plaintiff while it is actually returning a verdict for the defendant.[63]

A second trap is created when a jury mistakenly believes its percentage allocation of fault allows the plaintiff to recover that percentage of the plaintiff's damages. The *Seppi* court observed that a jury's decision to allocate fault reflects their decision on the damages the plaintiff should recover.[64] Trial courts ask juries to apportion the negligence between the parties and to determine the plaintiff's damages.[65] This request is likely to lead juries to speculate that their apportionment of damage to the plaintiff will reduce the plaintiff's recovery by the same amount.[66] The *Seppi* court reasoned that withholding information about the cut-off point in modified comparative negligence misleads the jury into believing that any determination of fault below 100 percent will allow the plaintiff to recover some damages.[67] The *Seppi*

57. Two courts allowed informing the jury prior to *Seppi*. However, neither discussed the rule or cited precedent. *Wing*, 300 A.2d at 501; *Smith*, 564 P.2d at 1012–13.

58. 579 P.2d 683 (Idaho 1978).

59. *Id.* at 692.

60. *Id.* at 689–90.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 690.

65. *Id.; see* WASHINGTON PATTERN JURY INSTRUCTIONS, *supra* note 26, 11.01.

66. *Seppi*, 579 P.2d at 690.

67. *Id.*

court stated that an informed jury will more carefully consider the facts before allocating fault and, therefore, the decision will accurately reflect the wisdom of the jury, not the jury's ignorance of the law.[68]

C. *The Elimination of the Rule Against Informing in Joint and Several Liability Cases*

Few states have addressed whether courts should inform juries of the effects of joint and several liability.[69] Of those states that have addressed the issue, a majority have allowed informing.[70] Two states, however, have prohibited courts from informing the jury of joint and several liability, one through judicial decision and the other legislatively.[71]

Decisions allowing courts to inform juries contain reasoning similar to that used by courts allowing instruction on modified comparative negligence.[72] These arguments fall into two general categories. First, several state courts hold that the same policy arguments applicable to modified comparative negligence apply to joint and several liability.[73] These courts reason that a jury shaping its verdict based on a false impression of the law presents a danger in both modified comparative negligence and joint and several liability cases.[74] According to these courts, both doctrines create a trap for the uninformed jury.[75] These

68. *Id.* at 690–91. Courts abolishing the rule after the *Seppi* decision have made additional arguments. Courts have noted that the design of prior law was to allow the jury to deliberate with full knowledge of the consequences of its decisions and these courts have held that the introduction of comparative negligence does not require a newfound distrust of the jury warranting the exclusion of information on the effects of the jury's answers. *See* Peair v. Home Ass'n of Enola Legion No. 751, 430 A.2d 665, 672 (Pa. Super. 1981); Adkins v. Whitten, 297 S.E.2d 881, 883 (W. Va. 1982). Courts have also held that they are compelled by their state's rules of civil procedure, prior judicial decision, or the comparative negligence statute itself to give an instruction on the law that is applicable to the facts of the case. *See Adkins,* 297 S.E.2d at 884; Johnson v. Safeway Stores, Inc., 568 P.2d 908, 911–12 (Wyo. 1977). Finally, some courts argue that it is erroneous to assume a biased jury or one that cannot perform its duty without yielding to passion or prejudice. *See* Thomas v. Board of Township Trustees, 582 P.2d 271, 280 (Kan. 1978); *Adkins,* 297 S.E.2d at 884.

69. COLO. REV. STAT. § 13-21-111.5(5) (1989); Kaeo v. Davis, 719 P.2d 387 (Haw. 1986); Luna v. Shockey Sheet Metal & Welding Co., 743 P.2d 61 (Idaho 1987); Reese v. Werts Corp., 379 N.W.2d 1, 3 (Iowa 1985); DeCelles v. State *ex rel.* Dept. of Highways, 795 P.2d 419 (Mont. 1990); Valentine v. Wheeling Elec. Co., 376 S.E.2d 588 (W. Va. 1988); Coryell v. Town of Pinedale, 745 P.2d 883 (Wyo. 1987) (superseded by statute).

70. *See infra* notes 72–81 and accompanying text.

71. COLO. REV. STAT. § 13-21-111.5(5) (1989) specifically prevents instruction on the effects of the jury's answers on defendants.

72. *See supra* notes 52–68 and accompanying text.

73. *Kaeo,* 719 P.2d at 395; *Luna,* 743 P.2d at 64–5; *DeCelles,* 795 P.2d at 421.

74. *See Kaeo,* 719 P.2d at 396; *Luna,* 743 P.2d at 64; *DeCelles,* 795 P.2d at 421.

75. *See Luna,* 743 P.2d at 65; *DeCelles,* 795 P.2d at 421.

courts believe that the trial court is in the best position to avoid this danger by informing the jury of the true operation of the law.[76]

A second group of state courts permitting the informing of juries base their decision upon procedural requirements. Courts in Iowa and Wyoming interpret their comparative negligence statutes as requiring the court to inform the jury of the consequences of their answers,[77] including the effects of their apportionment under the doctrine of joint and several liability.[78]

Two other state courts have used procedural rules to support their decision to allow informing the jury. The Hawaii and Montana courts cited consistency with their state rules of civil procedure as one reason to allow informing the jury.[79] Under each state's rule, the court must give the jury such explanation and instruction as may be necessary to enable the jury to find on each issue.[80] Both courts cited the consistency between the state's rule and informing the jury, but neither court provided an analysis of why the rules were consistent or why the consistency was significant.[81] Contrary to Montana, Idaho, and Hawaii, the West Virginia Supreme Court found the reasoning used to allow informing the jury of comparative negligence was inapplicable to joint and several liability. In *Valentine v. Wheeling Electric Co.*,[82] the court held that because comparative negligence had not changed the doctrine of joint and several liability, the court's earlier decision to allow instruction of a jury in a comparative negligence action was inapplicable to informing the jury of joint and several liability.[83] In addition, the West Virginia court found that the issue that joint and several liability presented was distinguishable from the issue that modified comparative negligence presented.[84] The West Virginia court held that its earlier decision that trial courts could inform juries of comparative

76. *See Kaeo*, 719 P.2d at 396; *Luna*, 743 P.2d at 64–65; *DeCelles*, 795 P.2d at 421.

77. IOWA CODE § 668.3(5) (1987); WYO. STAT. § 1-1-109(2)(B) (1988).

78. Reese v. Werts Corp., 379 N.W.2d 1, 3 (Iowa 1985); Coryell v. Town of Pinedale, 745 P.2d 883, 886 (Wyo. 1987) (superseded by statute).

79. *Kaeo*, 719 P.2d at 396; *DeCelles*, 795 P.2d at 421.

80. MONT. R. CIV. P. 49(a); HAW. R. CIV. P. 49(a). The wording of both Montana's and Hawaii's rule 49 is substantially the same as WASH. CT. R. 49.

81. *Kaeo*, 719 P.2d at 396; *DeCelles*, 795 P.2d at 421.

82. 376 S.E.2d 588 (W. Va. 1988).

83. *Id.* at 592 (citing Adkins v. Whitten, 297 S.E.2d 881 (W. Va. 1982) (courts may instruct juries on modified comparative negligence); Bradley v. Appalachian Power Co., 256 S.E.2d 879, 886 (W. Va. 1979) (adoption of comparative negligence did not alter joint and several liability)).

84. *Id.* Modified comparative negligence deals with measuring the negligence of the plaintiff against that of the defendants. Joint and several liability deals with the apportionment of damages among the defendants.

negligence was not applicable to joint and several liability because the issues are different.[85]

III. WASHINGTON COURTS SHOULD INFORM THE JURY OF THE EFFECTS OF JOINT AND SEVERAL LIABILITY

Washington courts should inform juries about joint and several liability. The decisions of states eliminating the rule against informing juries in comparative negligence actions are persuasive because Washington's form of joint and several liability creates pitfalls and traps for the jury that are similar to those that modified comparative negligence created. Additionally, the policy of Washington tort reform legislation and the state's prior jury instruction practices indicate that courts should inform juries of the effects of their answers.

A. A Rule Against Informing the Jury Is Likely to Produce Erroneous Results

Washington's joint and several liability system may create erroneous results by misleading the uninformed jury. An uninformed jury may inadvertently deny or impose joint liability resulting in the alteration of the jury's true determinations of liability. The jury's determinations of liability may also be changed when a party misleads the jury into the creation or denial of joint liability or when the uninformed jury speculates on the effects of its answers to special verdicts.

1. Failing to Inform the Jury of Washington's Joint and Several Liability Creates a Trap for Both Plaintiffs and Defendants

As in modified comparative negligence systems, Washington's joint and several liability system can create a trap for the uninformed jury. The natural tendency of juries to concern themselves with the effects of their answers, noted by the *Seppi* court, creates a trap for the jury under both doctrines.[86] The jury believes it is making a rational decision when, in truth, the decision may produce unforeseen and irrational results. In comparative negligence systems, courts find the system's cut-off point may lead an uninformed jury inadvertently to deny recovery.[87] Washington's joint and several liability system also has an arbitrary cut-off point. Assignment of one percent of fault to

85. *Id.*

86. *See supra* notes 60–68 and accompanying text.

87. *See supra* notes 60–68 and accompanying text.

the plaintiff can effectively deny recovery by the plaintiff or place an undue burden to pay the judgment on one defendant. To avoid the possibility that a jury will mistakenly speculate on the effects of its answers and to give effect to the jury's decision regarding recovery, Washington should join states allowing courts to inform juries of the effects of negligence law.

In Washington, both plaintiffs and defendants can use the trap that joint and several liability creates. A defendant can argue that, in fairness, the jury should assign a small percentage of fault to the plaintiff. The uninformed jury will not know that assignment of a small percentage of fault to the plaintiff has significant legal consequences. The jury's lack of knowledge may cause it to consider as trivial the assignment of a few percentage points of fault to the plaintiff. If the jury considers the assignment unimportant, it may comply with the defense's request without closely examining the facts to see if the assignment is warranted.

A jury might not consider this determination to be significant for two reasons. First, the assignment of a few percentage points of fault may seem warranted on first glance. In most accidents, the victim could have reacted to danger differently. For example, in the accident between Ann and Bob described earlier, Bob may reasonably argue that Ann should have swerved when she saw Bob's car coming toward her. Bob may argue that Ann's failure to swerve was contributory negligence. Ann's reaction, however, was not negligence but was, in reality, natural under the circumstances. An uninformed jury may assign a small percentage of fault to Ann, either believing her reaction was minimally negligent or wishing to underscore how little her reactions contributed to the accident. This mild reprimand may have the unintended consequence of eliminating joint liability between defendants.

A second reason the jury may consider the assignment of a small percentage of fault to be insignificant is created by the comparative negligence system itself. In its explanation of comparative negligence, the court tells the jury that the plaintiff's damages will be reduced by the percentage of fault caused by the plaintiff.[88] When the jury is awarding large damages, reducing the damage award by a few percentage points leaves the plaintiff with a large recovery. Without knowledge of the legal consequences of an assignment of fault to the plaintiff, such as those created by joint liability, the jury may not fully examine the facts to determine if the assignment is warranted. The

88. WASHINGTON PATTERN JURY INSTRUCTIONS, *supra* note 26, 11.01.

jury may mean only to lessen the liability of the defendant but may actually prevent the plaintiff from recovering most of the judgment.

If the plaintiff is allowed to explain the effects of the finding, however, the jury may consider the assignment of fault more closely. In this examination the jury may differentiate between a lack of ordinary care and normal reactions to a dangerous situation. The jury may also realize that their determination of fault must be accurate to warrant the possible consequences. Ultimately, an informed jury's assignment of fault will accurately reflect their determination of fault and not be a gesture of false fairness to the defense.

A pitfall may also exist from the defendant's point of view. Often plaintiffs join a city, county, school, hospital, large corporation, or other "deep pocket" defendant in a negligence action solely for the purpose of imposing joint and several liability.[89] An argument by the plaintiff that this defendant contributed a few percentage points to an injury is often plausible. Unless the jury is informed of the effects of joint and several liability, the jury may think this defendant will only be liable for a small contribution to the total damage award and the main defendant will be liable for the remainder. In reality, this deep pocket defendant may be liable for the entire award, with little hope of contribution from the party that is mainly at fault. Once again, a jury's uninformed determination to administer a mild reprimand may victimize a defendant.

The elimination of the trap created when a jury unknowingly creates joint liability has positive results. One positive consequence is the accurate determination that joint liability is warranted, instead of an arbitrary allocation of fault based on sympathy, bias or faulty reasoning. A second positive consequence is the elimination of the possibility that the jury's intent may be frustrated by the application of joint liability.

2. *Inaccurate Jury Speculation on Washington Law May Create Erroneous Results*

The likelihood that uninformed jurors will make inequitable findings based on a false idea of the law outweighs the risk that an informed jury will base their findings on bias, sympathy, or prejudice. Jurors may know the effects of their answers from prior experience,

89. Pressler & Schieffer, *supra* note 15, at 652 ; *see* Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee,* 57 TENN. L. REV. 199, 307 (1990); *see also* Kaeo v. Davis, 719 P.2d 387 (Haw. 1986) (joinder of city); Luna v. Shockey Sheet Metal & Welding Co., 743 P.2d 61 (Idaho 1987) (joinder of corporation); Seaton v. Wyoming Highway Comm'n, 784 P.2d 197 (Wyo. 1989) (joinder of state).

from the media, or from friends, acquaintances or relatives.[90] A juror or someone a juror knows may have learned of negligence law from involvement in the court system as a litigant or a juror. In addition, the law is often discussed in the media. Movies, television, and novels dramatize legal actors and concepts, and broadcast and print media report the developments in legal proceedings. Erroneous prior knowledge of the law or mistaken ideas developed during the course of the trial can lead a juror to speculate on how the jury's answers to special verdict questions will effect the outcome of the case.

Juror's outside knowledge is unlikely to reflect the current status of Washington law. The legal concepts represented in the media are presented for dramatic effect. These concepts are not presented by trained legal experts and may be inaccurate or oversimplified. Experience gained from other states is not consistent with Washington law. Similarly, knowledge gained from the juror's or another's experience with Washington negligence law prior to 1986 no longer represents Washington joint and several liability.

Jurors may also form ideas of the law while serving on the jury. In *Seppi,* the Idaho court noted that after listening to the arguments of counsel and the testimony of witnesses, most jurors will have formed conclusions about how their answers will affect the parties.[91] With the complexities of Washington's joint and several liability, uninformed speculation will probably be incorrect. Jurors are unlikely to realize that the plaintiff's insistence on a total freedom from fault is an effort to create joint liability. Nor is the jury likely to conclude that a minor defendant is arguing that the plaintiff was also at fault to avoid liability for the entire award. Instead, the jury will see each party placing blame on the other.

The ultimate result when a jury alters its answers to produce the results it desires based on incorrect assumptions, no matter how they reached these assumptions, may be contrary to their actual findings and will probably not reflect the jury's intent. To prevent the injustice that results when an arbitrary judgment or one based on false information is returned, courts should instruct juries on joint and several liability.

90. *See* Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact,* 20 GA. L. REV. 123, 141–45 (1985). Professor Kotler states that the "problem of having the jury return a verdict based, at least in part, on extra-judicial or idiosyncratic knowledge or belief, or on speculation based upon such knowledge or belief is one which has plagued trial lawyers and litigants probably for as long as juries have been deciding cases." *Id.* at 143.

91. Seppi v. Betty, 579 P.2d 683, 689–90 (Idaho 1978).

B. Informing Juries Is Consistent With Washington Tort Policy and Practice

The reforms in Washington tort law enacted by the Legislature to create fairness and to decrease insurance costs will be frustrated if courts do not inform juries of Washington joint and several liability. In addition, the reasoning of courts addressing similar issues is persuasive. Finally, previous Washington court practice and Washington Court Rules are consistent with courts informing juries.

1. Informing the Jury Is Consistent With the Policy Behind Washington Negligence Law

The Washington Legislature reformed the state's tort law to accomplish two goals. The first was to eliminate the harsh rules of common law negligence that denied recovery by injured plaintiffs for trivial or overly technical reasons.[92] The second was to decrease insurance costs.[93] Both these policies are defeated when courts are forbidden from informing the jury of the effects of joint and several liability.

The Legislature's desire to make negligence law more fair will be frustrated if a jury is not informed of joint and several liability. The application of the Washington doctrine of joint and several liability can have harsh consequences similar to those of common law doctrines such as contributory negligence. Washington juries, however, were aware of the effect of a finding of contributory negligence.[94] The decision of a jury deciding to find contributory negligence represented a determination that the severe consequences of the doctrine were warranted because the jury had full knowledge of the effects of its answers. A jury that is not informed of joint and several liability is not allowed to determine whether the consequences of the doctrine are warranted.[95] Instead, the jury's decision only reflects an ignorance of Washington law.

Informing the jury of the effect of joint and several liability also accomplishes the legislative policy of decreasing insurance costs. The Legislature's goal was to distribute equitably the costs of injury.[96] The Legislature believed an equitable distribution would lead to lower

92. *See* Act of April 4, 1986, ch. 305, § 100, 1986 Wash. Laws 1354, 1354; Act of April 17, 1981, ch. 27, § 1, 1981 Wash. Laws 112, 112; *see also supra* notes 5–7 and accompanying text (harshness of contributory negligence led to enactment of comparative fault).

93. *See* Act of April 4, 1986, ch. 305, § 100, 1986 Wash. Laws 1354, 1354; *see also supra* notes 18–22 and accompanying text.

94. *See supra* notes 31–33 and accompanying text.

95. *See supra* notes 86–89 and accompanying text.

96. Act of April 4, 1986, ch. 305, § 100, 1986 Wash. Laws 1354, 1354.

insurance rates.[97] To determine the equitable distribution of the cost of injury, a jury must know what that distribution will be. To effectuate the Legislature's goal of equitably distributing injury and eventually lowering insurance rates, the jury should base its decision to assign fault to the parties, including the plaintiff, on an understanding of the consequences.

2. *Washington Precedent and Practice Indicate that Courts Should Instruct Juries on Joint and Several Liability*

Washington should treat an instruction on joint and several liability in the same manner as abstract instructions on doctrines such as contributory negligence and assumption of risk. Under those doctrines, the court informed the jury of the effect of its answers on the ultimate outcome. Washington courts instructed the jury of the effects regardless of any sympathy or bias the instruction might have produced. The knowledge that the assignment of fault to the plaintiff will defeat joint liability is no more likely to alter the jury's answers than the knowledge that a finding of contributory negligence or assumption of risk would completely bar recovery.

Washington Court Rule 49 is another indicator favoring the instruction of juries on joint and several liability. Under Rule 49, the court is not required to limit the jury to special verdicts.[98] A court may submit the questions required under the Washington comparative fault statute as interrogatories accompanying a general verdict.[99] When the court submits a general verdict, the judge may charge the jury on the relevant abstract principles of law, including joint and several liability.[100] Instructing the jury on joint and several liability for a general verdict but not for a special verdict may make the outcome of the case dependent on the form of the verdict and not the facts of the case. This anomaly, possible only if courts may not instruct juries on joint and several liability when using a special verdict, contradicts the Washington Legislature's desire to create a distribution of losses that conforms with the principles of equity and fairness. Therefore, for Rule 49 to make sense and be consistent, courts should instruct juries on joint and several liability.

Rule 49 also requires that when a court submits a special verdict, the court must give the jury any instructions or explanations that may

97. *See supra* notes 18–22 and accompanying text.
98. WASH. CT. R. 49; *see also* BEST et al., *supra* note 11, § 3.30(2)(b).
99. *See supra* notes 23–26 and accompanying text.
100. *See supra* notes 27–30 and accompanying text.

be necessary to enable the jury to make its findings.[101] This is the same requirement that the Hawaii[102] and the Montana[103] courts held permitted courts to inform juries of the effects of joint and several liability.[104] Although these courts supplied little justification for their holdings, the results conform with Washington tort policy. To make the fair and equitable apportionment of fault that the Washington Legislature desired, the jury must know what the effects of their apportionment will be. Informing the jury is therefore necessary to the equitable determination of fault, and it is consistent with the requirement in Rule 49 that the court provide instruction that may be necessary to enable the jury to make its findings.

3. *The Decisions of Other States are Persuasive*

Both the decisions of courts that address the informing of juries in modified comparative negligence cases, and those addressing the informing of juries of common law joint and several liability are persuasive. The problems that comparative negligence creates in other states are analogous to those that Washington joint and several liability creates.[105] Washington joint and several liability also creates a trap for the uninformed jury.[106] A lack of knowledge about joint and several liability may mislead juries in a manner similar to modified comparative negligence.[107] Under either doctrine, a one percent difference in the percentage of fault assigned to the plaintiff has potentially huge and unforeseen consequences.[108] In addition, Washington courts have a history of allowing the jury to deliberate with full knowledge of the consequences of its actions. Other states recognize that no change in this practice is necessary when the common law is modified.[109] Like states addressing similar issues, Washington courts should instruct juries to overcome the problems created when a jury is not informed of the effects of its answers.

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101. WASH. CT. R. 49.

102. Kaeo v. Davis, 719 P.2d 387, 394 (Haw. 1986).

103. Decelles v. State *ex rel.* Dept. of Highways, 795 P.2d 419, 421 (Mont. 1990).

104. *See supra* notes 79–81 and accompanying text.

105. *See supra* notes 52–68 and accompanying text.

106. *See supra* notes 86–89 and accompanying text.

107. *See supra* notes 52–68, 86–89 and accompanying text.

108. In modified comparative negligence, one percentage point of fault may be the difference between recovery and no recovery. *See supra* notes 8–10 and accompanying text. Similarly, the difference, for all practical purposes, between a Washington plaintiff being one percent negligent and zero percent negligent may be the difference between full recovery and marginal recovery.

109. *See supra* note 68.

C. *Washington Courts Should Institute the Proposed Allowance of Jury Instructions on Joint and Several Liability*

Although both Washington courts and the Legislature could create a rule in favor of jury instructions, judicial creation of a new rule by judicial decision is the best method. While legislative creation of a new rule has advantages, the reality of politics makes the rule's creation unlikely. Because there is no case law on the subject, a court rule on informing juries is also improbable. The best solution, therefore, is the creation of a new rule through judicial decision.

1. *Legislative Creation of a Rule*

The Legislature could amend the Washington code to require that trial courts inform juries of the effects of their verdicts.[110] Several states have chosen this alternative in order to inform juries of the effects of modified comparative negligence.[111] None, however, have chosen legislative adoption of a rule to permit informing the jury of joint and several liability.

The failure of legislatures to act on the issue of informing a jury of joint and several liability may result from the realities of the legislative process. Without pressure from an interest group, legislators are unlikely to propose legislation allowing juries to be informed because of time demands or a lack of awareness or understanding of the problem. However, unorganized groups experience difficulty in initiating the legislative process. Potential plaintiffs are a diverse group and are not likely to be concerned about the informing of juries until after their trial. Deep pocket defendants may be an organized group, but they may not initiate legislation because of a resistance to change or a perception that the rule may injure their interests. Despite concern and potential harms, therefore, a legislative solution to the current problem is unlikely.

2. *A New Court Rule is Unlikely*

The Washington Supreme Court has the power to regulate and create rules governing the character of practice and procedure within the courts of the state.[112] A court rule may be an appropriate method of creating the rule because informing the jury is a procedural issue. The

110. *See* Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 666, 771 P.2d 711, 727 (1989) (legislature may prescribe factors to take into consideration in determining liability).

111. *See supra* note 55 and accompanying text.

112. WASH. REV. CODE ANN. § 2.04.190 (West 1989).

Judicial Council that formulates Washington's court rules,[113] however, is unlikely to create a rule allowing courts to inform the jury in the absence of case law on the subject.[114] The Judicial Council, in general, creates court rules to solve problems. Until several courts have addressed informing the jury and have produced differing results, the issue of informing the jury is not pressing enough to attract the attention of the Judicial Council.

3. *Judicial Decision Is the Best Way to Create a Rule Allowing Informing of Juries*

A court decision is the most practical, probable, and logical means of creating a new rule allowing courts to inform juries of joint and several liability when a party requests instruction. Courts are in a good position to evaluate the possible forms of a rule because courts see the effects of the rules they apply and create first hand. The rule will effect judicial proceedings and outcomes. The research required to understand these effects is equally available to courts and legislatures because it lies mostly in the experiences of other states that have judicially adopted similar rules. Courts are better able than legislators, however, to understand the legal intricacies involved in the creation and implementation of a new rule.

Additionally, litigants are better able to represent opposing views on the issue than are legislative interest groups. In general, the peoples' representatives should create laws, not the courts. Both potential plaintiffs and defendants in joint and several liability actions are represented among the constituents of each legislator. In reality, however, representation is unlikely to be even. The lobbying power of potential defendants outweighs that of unidentifiable future plaintiffs. The best assurance of vigorous representation for both sides is the actual controversy of a tort action. A judicial solution, moreover, does not circumvent the legislative process. A legislative determination of the issues that the modification creates may be proper because the Washington Legislature created the modified doctrine. A judicial rule would not invade the province of the Legislature because there has been no legislative action on the subject. A rule on informing juries would not preclude legislative action and does not contradict previous legislative decisions.

113. *See* Hugh Spitzer, *Court Rulemaking in Washington State,* 6 U. PUGET SOUND L. REV. 31, 46 n.85 (1982).

114. *See generally* Cornelius J. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law,* 48 MINN. L. REV. 265 (1963).

IV. CONCLUSION

The Washington Legislature's modification of the common law doctrine of joint and several liability may arbitrarily create or deny joint liability and frustrate an uninformed jury's intent. Neither the Washington Legislature nor the Washington Supreme Court has addressed the issue of informing juries of joint and several liability. Washington courts should inform juries of joint and several liability and its effects. Informed juries are aware of the judgment resulting from their assignment of fault. This awareness encourages careful consideration of the facts in each case and prevents parties' deliberate misleading of the jury and unintentional frustration of the outcome that the jury intended.

Julie K. Weaver